Petition

81-1959

Supreme Court, U.S.
FILED
APR 23 1982
ALEXANDER L. STEVAS
CLERK

No.:_____

IN THE

Supreme Court of the United States

October Term, 1981

SAMUEL SEMBLE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL SEMBLE
Pro Se
18 Bengeyfield Drive
East Williston, New York 11596
(516) 246-7031

Questions Presented

1. Whether this Court should grant the petition so that a conflict among the Circuit Courts of Appeals may be resolved?

2. Whether the Court of Appeals erred in rejecting Petitioner's due process challenge to the district court's jury instruction concerning his credibility as a witness?

Table of Contents

Questions Presented i

Opinion Below 2

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 9

II. The Decision Below Conflicts with the Decision of Other Courts of Appeals That the Charge on Defendant's Credibility As Given in This Case Is Error. 9

II. The Decision Below Sustaining the District Court's Charge on a Defendant's Interest Denied Petitioner Due Process of Law. 10

Conclusion 12

Appendix A – Opinion of United States Court of Appeals 1a

Appendix B – Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing *In Banc* 6a

Table of Authorities

Cases:

Sandstrom v. Montana,
442 U.S. 510 (1979) 11, 12

United States v. Anderson,
642 F.2d 281 (9th Cir. 1981) 9

United States v. Bear Killer,
534 F.2d 1253 (8th Cir. 1976) 9

United States v. Figurski,
545 F.2d 389 (4th Cir. 1976) 9

United States v. Floyd,
555 F.2d 45 (2d Cir. 1977) 9

United States v. Mill,
470 F.2d 361 (D.C. Cir. 1972) 9

United States v. Palmere,
578 F.2d 105 (5th Cir. 1978),
cert. denied, 439 U.S. 1118 (1979) 9

United States v. Saletko,
452 F.2d 193 (7th Cir. 1971) 9

United States v. Standing Soldier,
538 F.2d 196 (8th Cir. 1976) 9

United States v. Taylor,
390 F.2d 278 (8th Cir. 1968) 9

Statutes:

18 U.S.C. § 371 ..... 1, 3

18 U.S.C. § 1001 ..... 1, 4

28 U.S.C. § 1254(1) 2

Other Authorities:

Devitt & Blackmar, *Federal Jury Practice and Instructions* (3d Ed. 1977) 10, 11

Federal Criminal Jury Instr. of the Seventh Circuit, Comm. on Fed. Crim. Jury Instr., Instruction 1.02 11

Pattern Jury Instr., Crim. Cases, United States Fifth Circuit District Judges Association, Basic Instr. 6 11

United States Constitution
Fifth Amendment 2, 11
Fourteenth Amendment 11

U.S. Sup.Ct. Rule 19(1)(b), 28 U.S.C. 9

No.:_____

IN THE

Supreme Court of the United States

October Term, 1981

SAMUEL SEMBLE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Samuel Semble, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 11, 1982, affirming his conviction, on April 27, 1981, of violations of 18 U.S.C. §§ 371 and 1001. On February 24, 1982, the Second Circuit denied petitioner's motion for a rehearing *in banc.*

Opinion Below

The opinion of the Court of Appeals for the Second Circuit affirming petitioner's conviction is as yet not reported and appears in the Appendix hereto at pages 1a-5a.

Jurisdiction

The decision of the Court of Appeals for the Second Circuit was filed on January 11, 1982. Petitioner's motion for a rehearing *in banc* was denied on February 24, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

On March 29, 1982, petitioner applied to the Honorable Thurgood Marshall, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit, for a stay of sentence pending the completion of certiorari proceedings in this court. Justice Marshall deferred ruling on the application and instructed the Solicitor General to file a response by April 9, 1982. On that date, after receiving the Government's Memorandum in Opposition, Justice Marshall denied the stay.

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case

In September of 1976, the Joseph Morton Company (JMCo) was awarded a $10,490,000 fixed-price contract by the United States Department of Agriculture to construct additions to the Plum Island Animal Disease Center on Long Island (85).* Joseph Battaglia, the president of JMCo and its sole shareholder, had prepared the bid which the USDA accepted (2503, 2374).

In December of 1976 petitioner, Samuel Semble, a mechanical engineer, began working for JMCo, primarily on the Plum Island project. He was a full-time consultant in the mechanical field (3180-3182). At no time during his employment at JMCo was he ever a shareholder or officer of that company.

The contract between USDA and JMCo anticipated the possibility that revisions in the Plum Island construction plans might be necessary. The contractor was obligated, in this circumstance, to submit cost and pricing data to enable USDA to adjust the original contract price (i.e., whether to increase the contractor's fee because of additional work required by the revision or to decrease it due to the deletion of work).

A specific revision in the project-change Order Number 2 (CO-2) -- and the process of adjusting the contract price in response to it -- became an object of contention between the USDA and JMCo. The various submissions to the USDA, in which JMCo attempted to resolve the dispute, became the subject of the indictment involved in this case. JMCo, Joseph Battaglia and petitioner, Samuel Semble, were charged with a conspiracy to make false statements and to defraud the USDA by preparing fraudulent cost breakdowns regarding the labor and materials affected by CO-2 (18 U.S.C. § 371). It was also alleged that Battaglia and petitioner solicited and received fraudulent documentation from suppliers and submitted false cost data on the suppliers' own stationery without

---

* Numbers in parentheses refer to the trial transcript.

their authorization. Three of the submissions made by JMCo were the subject of independent counts in the indictment charging the making of false statements (18 U.S.C. § 1001).

The case against petitioner and his co-defendants can be distilled to the following essential facts:

1) Ronald Spinelli, the President of Anron Air Systems, the sheetmetal subcontractor, testified that the cost data for his work on CO-2 submitted to USDA by JMCo was false; he had not given that data to JMCo during his discussions with Battaglia (1015, 1040-41, 1053).

Battaglia testified that Spinelli had agreed to the costs submitted and had authorized their submission (2619-20).

As the Plum Island job progressed, antagonism developed between Battaglia and Spinelli. By the time of trial, Anron Air Systems had a $300,000 breach-of-contract suit pending against JMCo; the latter's counterclaim against Anron was $700,000 (1315).

2) William Farrell, the Sales Manager of Process Valves, a valve supplier, testified that petitioner asked him to submit a quotation on a set of valves involved in CO-2 without the discount he had originally offered JMCo.

The Government claimed that petitioner, by soliciting a second quotation without the discount, was aware of the falsity of the non-discounted price used in JMCo submissions. However, petitioner testified that he requested the revised quotation from Farrell at the specific directive of Battaglia; it was Battaglia's role, as president of JMCo, to decide whether or not a discount should be taken on a particular item. Petitioner felt that the valve price was correct with or without the discount (3222-23).

3) George Cadwell and John Cherry, the Vice President and Engineering Manager respectively of Flanders Filter, a filter supplier, testified that the cost data submitted by JMCo to the USDA relating to certain of its filters was not correct.

Battaglia testified that the figures used in the JMCo submissions for the Flanders filters had been given to him by Cadwell and Cherry at a meeting in February of 1977.

4) Franklin Sinclair, the President of Braddock Industries, a valve supplier, testified under a grant of immunity from the Government via a cooperation agreement (801-2). He stated that petitioner had telephoned him and asked him to send JMCo a quotation on butterfly valves at a certain price. Sinclair claimed that he told petitioner the price he had cited was incorrect. After an argument, petitioner induced Sinclair to send the quote by offering him an order in the future if he would do JMCo this favor (821-23).

Petitioner contradicted Sinclair's testimony. He testified that when he spoke to Sinclair there was no discussion about false prices or any indication that Sinclair had any difficulty with the price cited. Sinclair agreed to send the quotation containing the prices requested (3267, 3268, 3271-73).

Petitioner's general position on the submissions was that Battaglia had compiled the supporting documentation from suppliers and subcontractors which formed the substance of the CO-2 submissions to USDA. Petitioner's role was limited to taking the cost data Battaglia had obtained and doing the breakdowns, computations, transformations and insertions required in order to put the data into the form dictated by USDA.

With this background, where the credibility of the various witnesses was the paramount issue in the case, the colloquy regarding requests to charge took place.

The Government submitted, *inter alia*, Request 35 (as amended):

> The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence.
>
> A defendant cannot be compelled to take the stand and testify. Whether or not he testifies is a matter of his own choosing.
>
> If a defendant does choose to testify, and the defendant Battaglia and the defendant Semble each did in this case, the defendant testifies as a competent witness. Thus, the defendant's testimony is to be judged in the same way as that of any other witness.
>
> The testimony of individual defendants is before you. You must determine how far the testimony of each defendant is credited. The deep personal interest which every defendant has in the result of his case should be considered in weighing his testimony.
>
> You are instructed insofar as false testimony, the greater the interest the stronger the temptation, and the vital interest of a defendant in the outcome of his trial is a matter which may seriously affect the credence which should be given to his testimony.
>
> However, you are instructed that a defendant's vital interest in the outcome of his trial is not inconsistent with the ability to render truthful testimony.

Petitioner submitted, *inter alia*, Request 8:

> CREDIBILITY OF WITNESSES –
> DISCREPANCIES IN TESTIMONY
>
> You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

The trial court stated that:

"35 as amended I'll give. And I'll give my standard charge which is the amended charge in essence." (3527)

It rejected petitioner's Request to Charge No. 8, observing "No, eight I give essentially in my own words." (3546)

The relevant portion of the trial court's charge to the jury follows:

> A defendant who wishes to testify is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness.
>
> The law permits a defendant, at his own request to testify on his own behalf. The testimony of individual defendants is before you. You must determine in each instance how far it is credible. *The deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of a defendant is of a character possessed by no other witness and is, therefore, a matter which may seriously affect the credence that should be given to his testimony.* (Emphasis added)
>
> However, I also charge you with equal force that a defendant's vital interest in the outcome of his trial is not inconsistent with his ability to render truthful testimony. (3914-15)

The Court of Appeals for the Second Circuit sustained this charge on the merits, as substantially identical with similar charges approved by it in the past. See Appendix at page 4a.

Reasons for Granting the Writ

I.

The Decision Below Conflicts with the Decision of Other Courts of Appeals That the Charge on Defendant's Credibility As Given in This Case Is Error.

The traditional charge on a defendant's credibility as a witness has been rejected by the Eighth Circuit Court of Appeals. *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir. 1976); *United States v. Standing Soldier*, 538 F.2d 196, 204 (8th Cir. 1976); See *United States v. Taylor*, 390 F.2d 278, 284-85 (8th Cir. 1968)(per Judge, now Mr. Justice Blackmun).

The Seventh Circuit has also expressed its preference that the charge on a defendant's interest should not be given. *United States v. Saletko*, 452 F.2d 193, 197-98 (7th Cir. 1971). In contrast, the other Circuits still endorse the charge. See, *e.g.*, *United States v. Anderson*, 642 F.2d 281, 286 (9th Cir. 1981); *United States v. Palmere*, 578 F.2d 105, 108 (5th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979); *United States v. Floyd*, 555 F.2d 45, 47 & n. 4(2d Cir. 1977); *United States v. Figurski*, 545 F.2d 389, 392 (4th Cir. 1976); *United States v. Mill*, 470 F.2d 361, 363-65 (D.C. Cir. 1972).

This conflict justifies the grant of certiorari to review the judgment below. U.S. Sup.Ct. Rule 19(1)(b), 28 U.S.C.

II.

The Decision Below Sustaining the District Court's Charge on a Defendant's Interest Denied Petitioner Due Process of Law.

The charge given by the District Court Judge on the credibility of a testifying defendant was a particularly devastating version of this always damaging instruction. In the most destructive portion of its charge -- i.e., "You are instructed that [the defendants'] interest creates a motive for false testimony" -- the District Court even went further than the charge requested by the Government, which does not contain such language.

Devitt & Blackmar, in the Preface to their authoritative treatise *Federal Jury Practice and Instructions* (3d Ed. 1977), noted that:

> "Some of the ancient formulations are no longer safe. A judge should consider very carefully whether he should instruct a jury that it may find that 'a person intends the natural and probable consequences of his acts,' and should never say that the law presumes such intent. We recommend, indeed, that the word "presumption" not be used in a jury charge. A judge courts almost certain reversal now if he tells the jury that witnesses are presumed to speak the truth. *The practice of some judges of telling the jury that, if the defendant testifies, they should consider his very great interest in the case, has come under increasing criticism and a judge now uses this method of expression only at great risk.*" *Id.*, III-IV (Emphasis added)

Devitt & Blackmar recommend that the jury be instructed as follows:

> "A defendant who wishes to testify is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness." *Id.*, § 17.12

The defect of a charge singling out the defendant's interest for special scrutiny is that "the instruction does not tell the jurors anything they do not already know and seems to tell them to be careful about believing the defendant." *Id.* at 550.

Two recent collections of pattern jury instructions on federal criminal cases tacitly endorse the reasoning of Devitt & Blackmar by omitting any reference to the defendant's special interest in their charge on witnesses' credibility. Pattern Jury Instr., Crim. Cases, United States Fifth Circuit District Judges Association, Basic Instr. 6; Federal Criminal Jury Instr. of the Seventh Circuit, Comm. on Fed. Crim. Jury Instr., Instruction 1.02.

It is apparent, also, that based on this Court's decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979), the effect of such an instruction is to detract from the presumption of innocence -- by attributing a lack of credibility to every indicted defendant -- and to shift the burden of proof from the Government to the defendant, results which are violative of the due process clauses of the Fifth and Fourteenth Amendments.

In a case such as this, where credibility was the entire case, the charge given on the defendants' interest and its effect on his credibility inherently constitutes prejudicial error. Aggravating this error, the District Court chose not to refer to significant interests possessed by two crucial Government witnesses -- i.e., the monetary interest of Spinelli in his lawsuit against JMCo and the interest of Sinclair flowing from his immunity agreement with the Government.

Even if the District Court's charge on defendant's credibility is not deemed sufficient by itself for reversal, in combination with the District Court's silence on the palpable interests of Government witnesses this partial and unbalanced charge cannot be sustained.

Conclusion

For the foregoing reasons, in order to resolve a conflict between the Circuits, to decide an issue of tremendous importance in the administration of the Federal criminal justice system and to ascertain the proper interpretation of this Court's opinion in *Sandstrom v. Montana*, it is hereby respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

SAMUEL SEMBLE *
Pro Se
18 Bengeyfield Drive
East Williston, New York 11596
(516) 246-7031

---

* Petitioner was advised in the preparation of this petition by his son, Monroe A. Semble, Esq., a member of the New York State Bar and the bar of the United States District Courts for the Eastern and Southern Districts of New York. Monroe A. Semble was admitted by the Court of Appeals for the Second Circuit to that Court *pro hac vice* to represent petitioner in his appeal. Although Monroe A. Semble will not meet the three-year requirement for admission to the Supreme Court until November of 1982, he shall, if this Court grants certiorari, move at that time to be admitted *pro hac vice* in order to argue petitioner's cause.

Appendix

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of January, one thousand nine hundred and eighty-two.

Present:

HONORABLE LEONARD P. MOORE,
HONORABLE IRVING R. KAUFMAN,
HONORABLE ELLSWORTH
VAN GRAAFEILAND,
Circuit Judges,

Nos. 81-1174, 81-1233

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH BATTAGLIA, JOSEPH MORTON
COMPANY, INC., SAMUEL SEMBLE,
Defendants-Appellants.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appendix A
Opinion of United States Court of Appeals

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby are affirmed.

1. Appellants contend that Judge Platt improperly denied their pretrial motion, pursuant to 28 U.S.C. § 455(a) and (b)(1), for an order disqualifying him from presiding over the instant case at trial. Appellants assert the judge erroneously failed to recuse himself on the ground that the case was improperly assigned to him pursuant to Rule 3 of the Individual Assignment and Calendar Rules for the Eastern District of New York (hereinafter "Local Calendar Rules"), in light of the pendency of related civil cases before the same trial judge. Appellants never made this argument below. Furthermore, Local Calendar Rule 3 authorizes the calendar deputy to assign a case to a trial judge who has been assigned to a "related case." Although the rule provides examples of the assignment of a civil case to a judge with a related civil case and a criminal case to a judge with a related criminal case, the rule specifically states that "[these examples are] by way of illustration and not limitation." Appellants conceded that the civil cases pending before Judge Platt "arise out of the same facts as the instant indictment." Accordingly, Judge Platt did not err in denying appellants' disqualification motion on the ground that the case was improperly assigned to him.

2. Moreover, appellants contend that Judge Platt improperly denied their disqualification motion on the ground that his participation in the civil cases raised the probability that he had acquired personal knowledge of disputed evidentiary facts in the criminal trial, and that his participation therefore resulted in the appearance of impartiality. Since "personal knowledge" requiring disqualification pursuant to 28 U.S.C. § 455 does not include knowledge acquired in the course of judicial proceedings in the same or a related case, *see United States v. Wolfson*, 558 F.2d 59, 62 (2d Cir. 1977), Judge Platt acted well within his discretion in denying appellants' disqualification motion.

3. Appellants contend that they were deprived of a fair trial because Judge Platt excessively intruded at trial and conveyed his view with respect to their guilt. The examples of alleged judicial impropriety presented by appellants occupy only isolated portions of the more than four thousand pages of the trial transcript. The length and complexity of this trial make Judge Platt's questions an appropriate and reasonable means of clarifying the difficult issues. *See United States v. Williams*, 575 F.2d 388, 392 (2d Cir.), *cert. denied*, 439 U.S. 842 (1978). Since the record demonstrates that Judge Platt's criticisms of defense counsel were infrequent and were generally made outside the presence of the jury, and since his remarks and questions were both innocuous in light of the overwhelming evidence of guilt and directed toward achieving an expeditious resolution of the case, appellants have not made a sufficient showing of prejudice to warrant a new trial. *United States v. Robinson*, 635 F.2d 981 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 2333 (1981).

4. Appellants assert that the court's charge to the jury on their interest in testifying was unbalanced and prejudicial. In instructing the jury that the "defendant's testimony is to be judged in the same way as that of any other witness," that the jury "should consider "the deep personal interest" in determining the credibility of each defendant's testimony," but that this interest "is not inconsistent with his ability to render truthful testimony," Judge Platt delivered a balanced instruction substantially identical with those approved by this Court. *See, e.g., United States v. Martin*, 525 F.2d 703 (2d Cir.), *cert. denied*, 423 U.S. 1035 (1975).

5. Appellants contend that the trial court improperly refused to charge the jury that "materiality" was an essential element for the jury to consider in determining whether appellants were guilty of making false statements in violation of 18 U.S.C. § 1001 (1976). Since materiality is an element of the offense of making false statements in violation of 18 U.S.C. § 1001, see *United States v. Marchesio*, 344 F.2d 653, 666 (2d Cir. 1965), appellants' claim is without merit.

6. Appellant Semble claims that the district court erred in denying his pretrial motion for severance from codefendants Battaglia and the Joseph Morton Co., Inc., on the ground that he was prejudiced by the "spillover" effect of evidence introduced by the Government to prove that Battaglia and the Joseph Morton Co. were guilty of obstruction of justice in violation of 18 U.S.C. §§ 1503 and 2. Since the proof concerning his codefendants' efforts to conceal the records from the grand jury was simple and distinct from the rest of the case, the trial court gave limiting instructions during the trial and in its final instructions to the jury, and the evidence against Semble on the counts

under which he was charged in the indictment was overwhelming, Semble has not made the requisite showing of "substantial prejudice" warranting a new trial. *United States v. Ochs*, 595 F.2d 1247, 1260 (2d Cir.), *cert. denied*, 444 U.S. 955 (1979).

7. All other claims raised by any or all of the appellants are equally without merit.

8. Accordingly, the judgments of conviction entered by Judge Platt are affirmed in all respects.

/s/ _____
LEONARD P. MOORE,

/s/ _____
IRVING R. KAUFMAN,

/s/ _____
ELLSWORTH
VAN GRAAFEILAND,
Circuit Judges.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 24th day of February, one thousand nine hundred and eighty-two.

Nos. 81-1174, 81-1233

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-v-

JOSEPH BATTAGLIA, JOSEPH P. MORTON COMPANY, INC., SAMUEL SEMBLE,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Samuel Semble,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____

A. Daniel Fusaro
Clerk

by Francis X. Gindhart
Chief Deputy Clerk

Opposition

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1959

In the Supreme Court of the United States

OCTOBER TERM, 1981

SAMUEL SEMBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

VINCENT P. MACQUEENEY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the trial court's charge on petitioner's credibility as a witness constituted reversible error.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Cupp v. *Naughten*, 414 U.S. 141 4

Doyle v. *Ohio*, 426 U.S. 610 4

Morrone v. *United States*, cert. denied, No. 81-985 (Feb. 22, 1982) 7

Reagan v. *United States*, 157 U.S. 301 ..... 4, 5, 7

Sandstrom v. *Montana*, 442 U.S. 510 6

Taylor v. *United States*, 390 F. 2d 278 7

United States v. *Anderson*, 642 F. 2d 281 5

United States v. *Bear Killer*, 534 F. 2d 1253 7

United States v. *Eskridge*, 456 F. 2d 1202, cert. denied, 408 U.S. 926 5

United States v. *Figurski*, 545 F. 2d 389 5

United States v. *Hill*, 470 F. 2d 361 5

United States v. *Floyd*, 555 F. 2d 45 5

United States v. *Frady*, No. 80-1595 (Apr. 5, 1982) 4

Page

Cases—Continued:

United States v. *Mahler*, 363 F. 2d 673 5

United States v. *Palmere*, 578 F. 2d 105, cert. denied, 439 U.S. 1118 5

United States v. *Park*, 421 U.S. 658 4

United States v. *Rutkin*, 189 F. 2d 431, aff'd on other grounds, 343 U.S. 130 5

United States v. *Saletko*, 452 F. 2d 193 7

United States v. *Standing Soldier*, 538 F. 2d 196 7

Williams v. *United States*, cert. granted, No. 80-2116 (Dec. 7, 1981) 7

Statutes and rule:

18 U.S.C. 2 2

18 U.S.C. 371 1

18 U.S.C. 1001 2

18 U.S.C. 1503 2

Fed. R. Crim. P. 30 4

Miscellaneous:

1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* (3d ed. 1977) 6

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1959

SAMUEL SEMBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1982. A timely petition for rehearing was denied on February 24, 1982. The petition for a writ of certiorari was filed on April 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner, Joseph Battaglia, and Joseph Morton Company, Inc., were each convicted of conspiracy to make false statements and to defraud the United States, in violation of 18 U.S.C. 371, and on three counts of making false statements, in violation

of 18 U.S.C. 1001 and 2.[1] Petitioner was sentenced to three months' imprisonment and a fine of $20,000. He was also placed on probation for a period of five years. The court of appeals affirmed (Pet. App. 1a-5a).[2]

1. The evidence at trial, the sufficiency of which is not questioned, shows that in September 1976, after competitive bidding, the Department of Agriculture awarded a $10,490,000 fixed price contract to Joseph Morton Company, a general contractor. Under the contract, the company was to construct additions to a research facility owned and operated by the Department of Agriculture. These additions included an exhaust air filter system to decontaminate laboratory air before it was expelled into the atmosphere. In December 1976, the plans for the filter system were substantially revised. Morton Company was, therefore, requested to submit cost and pricing data to enable the Department of Agriculture to determine the extent the original contract price should be adjusted.

Between March and July 1977, Battaglia, the president of Morton Company, and petitioner, an employee of the company, prepared and submitted fraudulent "cost breakdowns" regarding labor and materials to the contracting officer assigned to adjust the contract price. One of the cost breakdowns was inflated by more than $200,000. As part of the scheme, petitioner not only submitted false data, but also made a series of telephone calls to obtain fraudulent documentation to support the data.

---

[1]Battaglia and Morton Company were also convicted of obstruction of justice, in violation of 18 U.S.C. 1503.

[2]On March 4, 1982, the court of appeals denied an application for stay of its mandate pending the filing of a petition for a writ of certiorari. On April 9, 1982, Justice Marshall denied petitioner's request for a stay of sentence pending the filing of a petition for a writ of certiorari in this Court.

At trial, petitioner admitted that he prepared documents that were part of the cost breakdowns submitted to the Department of Agriculture, but stated that when he prepared the documents he had no knowledge of the source or accuracy of the information because he simply copied it from other documents Battaglia had given him. Petitioner's description of his limited role in the scheme was inconsistent with the testimony of several government witnesses, including the testimony of two individuals who had provided fraudulent documentation at petitioner's request.

2. As part of its instructions to the jury, the court stated (Tr. 3914-3915):

> A defendant who wishes to testify is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness.
>
> The law permits a defendant, at his own request, to testify on his own behalf. The testimony of individual defendants is before you. You must determine in each instance how far it is credible. The deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of a defendant is of a character possessed by no other witness and is, therefore, a matter which may seriously affect the credence that should be given to his testimony.
>
> However, I charge you with equal force that a defendant's vital interest in the outcome of his trial is not inconsistent with his ability to render truthful testimony.

Defense counsel raised no objection to this instruction.

ARGUMENT

Petitioner contends that the district court committed reversible error in pointing out the defendant's obvious interest in his case as a factor to be considered by the jury in evaluating his credibility. Petitioner also suggests that this instruction effectively shifted the burden of the proof from the government to him. The court of appeals properly rejected these contentions.

No timely objection to the instruction was made at trial and, therefore, petitioner's claims are barred by Fed. R. Crim. P. 30, unless the instruction was not only error but plain error affecting substantial rights. As this Court recently stated, the plain error rule has a very limited function in the context of jury instructions to which no objection was made. It may be invoked only in the case of "a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, No. 80-1595 (Apr. 5, 1982), slip op. 10-11. It "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.* at 11 n.14. Here there was no error at all, let alone one threatening a miscarriage of justice.

When the challenged instruction is examined in context (see *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973); *United States* v. *Park*, 421 U.S. 658, 674 (1975)), it is quite plain there was no error. It is axiomatic "that a testifying defendant has more to gain and less to lose than an ordinary witness from fabrications upon the witness stand." *Doyle* v. *Ohio*, 426 U.S. 610, 629 n.8 (1976) (Stevens, J., dissenting). Accordingly, it has long been recognized that a trial judge may properly call to the jury's attention the special interest of a testifying defendant. The Court so held in *Reagan* v. *United States*, 157 U.S. 301, 305 (1895):

> It is within the province of the court to call the attention of the jury to any matters which legitimately affect [a defendant's] testimony and his credibility. This does not imply that the court may arbitrarily single out his testimony and denounce it as false. The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is, therefore, a matter properly to be suggested by the court to the jury.

In *Reagan*, this Court upheld an instruction that "[t]he deep personal interest which [the defendant] may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit." 157 U.S. at 304. The courts of appeals have repeatedly upheld similar instructions that specifically direct the jurors' attention to a testifying defendant's interest in his case as a factor to be considered in evaluating his credibility.[3]

The district court's instructions were fair and balanced, and, in context, it is clear that they did not unduly emphasize a defendant's interest in the outcome of his own trial. First, before he gave the instructions challenged in this case, the trial judge described (Tr. 3912-3914) the factors that

---

[3]See, *e.g.*, *United States* v. *Anderson*, 642 F. 2d 281, 286 (9th Cir. 1981); *United States* v. *Palmere*, 578 F. 2d 105, 108 (5th Cir. 1978), cert. denied, 439 U.S. 1118 (1979); *United States* v. *Floyd*, 555 F. 2d 45, 47 & n.4 (2d Cir. 1977); *United States* v. *Figurski*, 545 F. 2d 389, 392 (4th Cir. 1976); *United States* v. *Hill*, 470 F. 2d 361, 363-365 (D.C. Cir. 1972); *United States* v. *Eskridge*, 456 F. 2d 1202, 1205-1206 (9th Cir.), cert. denied, 408 U.S. 926 (1972); *United States* v. *Mahler*, 363 F. 2d 673, 678 (2d Cir. 1966); *United States* v. *Rutkin*, 189 F. 2d 431, 439 n.6 (3d Cir. 1951), aff'd on other grounds, 343 U.S. 130 (1952).

should be considered in evaluating the credibility of witnesses generally. The court specifically noted that a witness's motives, his relationship to either side of the case, and the ways in which he might be affected by the verdict were factors to be considered in evaluating his credibility; in addition, the court directed the jurors to take into account such factors as the witness's intelligence, his demeanor and manner on the stand, his ability to observe the matters about which he testified, and the extent to which his testimony was corroborated or contradicted by other credible evidence in the case. See 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 17.01 (3d ed. 1977). Second, the district court prefaced its remarks concerning a defendant's interest in his case with the statement that a defendant's credibility was to be evaulated in the same manner as that of any other witness. See *id.* at § 17.12. Third, immediately after noting the impact that a defendant's obviously unique interest in the outcome of his trial might have on his credibility, the district court specifically admonished the jurors that such an interest is not inconsistent with the ability to give truthful testimony.

It cannot be denied that a criminal defendant's interest in his own case is unique. In this case the trial judge mentioned that fact and directed the jurors to consider it in evaluating the credibility of the testifying defendants just as they would consider the interest of any other witness. The accurate and evenhanded instructions of the district court in this case are wholly unobjectionable.[4]

---

[4]Contrary to petitioner's assertion (Pet. 11), the district court's instruction is fully consistent with the holding of the Court in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). In *Sandstrom*, the Court held that it was constitutionally impermissible to instruct the jury in a murder trial that " '[t]he law presumes that a person intends the ordinary consequences of his voluntary acts' " (442 U.S. at 515) because reasonable jurors might interpret such an instruction as relieving the state of the burden of proving beyond a reasonable doubt that the

Petitioner apparently contends (Pet. 9) that the unpublished decision of the court of appeals in this case conflicts with decisions of the Seventh and Eighth Circuits, citing *United States* v. *Standing Soldier*, 538 F. 2d 196, 204 (8th Cir. 1976); *United States* v. *Bear Killer*, 534 F. 2d 1253, 1260 (8th Cir. 1976); *United States* v. *Saletko*, 452 F. 2d 193, 197-198 (7th Cir. 1971); *Taylor* v. *United States*, 390 F. 2d 278, 284-285 (8th Cir. 1968) (Blackmun, J.).[5] In each of these cases the court expressed a "preference" that the interest of a defendant not be separately noted. In none of them, however, did the court reverse a conviction because the district court gave the disfavored instruction. This insignificant difference of opinion as to "preferred" jury instructions does not warrant review in this Court. Indeed, recently the Court declined at least two opportunities to reconsider the views expressed in *Reagan* v. *United States*, *supra*. See *Morrone* v. *United States*, cert. denied, No. 81-985 (Feb. 22, 1982); *Williams* v. *United States*, cert. granted on other issues, No. 80-2116 (Dec. 7, 1981).

---

defendant acted with the requisite intent. Nothing in the instruction challenged here could reasonably be understood as shifting the burden of proving anything to any defendant. As explained in the text, the district court simply told the jurors that in evaluating a defendant's credibility, his interest in the case should be considered as would the interest of any other witness. Moreover, the trial court explicitly told the jurors (Tr. 3666-3668) that the burden of proving each element of the offenses charged beyond a reasonable doubt was always on the prosecution and never shifted to the defense.

[5]Petitioner also states that the decisions of the Seventh and Eighth Circuits cited in the text conflict with several of the decisions cited in note 3, *supra*. Whatever the merits of that assertion, it provides no basis for granting certiorari to review the decision of the court of appeals in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

VINCENT P. MACQUEENEY
Attorney

MAY 1982

DOJ-1982-05